Supreme Court, U.S.
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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DETECTIVE McCOMISKEY and POLICE OFFICER O'BRIEN,

Petitioners,

-against-

CARLOS SOBA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 20, 1991.

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit, in affirming the District Court's determination that petitioners Detective McComiskey and Police Officer O'Brien were not entitled to qualified immunity based upon the jury's reasonable inference that these two officers acted maliciously or wantonly in using excessive force to effect respondent Carlos Soba's arrest, misapply the doctrine of qualified immunity as enunciated by this Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), in light of Soba's own version of the events to which he testified, the undisputed facts, Soba's failure to articulate or demonstrate what lesser degree of force or other lesser measures could or should have been taken, or what amount of force would have been objectively reasonable at that distance of 8-10 feet, in that time sequence of a matter

of seconds, and against an illegally defaced, sawed-off shotgun over one foot in length, wielded by a suspected felon surrounded by police officers in the course of fleeing from the scene of an armed robbery to which these officers had been summoned?

2. In affirming the determination that Detective McComiskey and Police Officer O'Brien used excessive force, did the Second Circuit properly apply the "objective reasonableness" standard articulated by this Court in Graham v. Connor, 490 U.S. 386 (1989)?

PARTIES

The parties in his case at the time it was commenced were as follows:

1. Carlos Soba, plaintiff,

2. Detective McComiskey, defendant.

3. Police Officer O'Brien, defendant.

4. Sergeant McGoey, defendant.

5. Police Officer Blackwell, defendant.

6. Police Officer Langan, defendant.

7. New York City Police Department, defendant.

8. City of New York, defendant.

The petitioners are parties 2 and 3, defendants below.

The respondent is party 1, plaintiff below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Detective McComiskey and Police Officer O'Brien respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-titled proceeding on May 24, 1991.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit, dated May 24, 1991 is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Southern District of New York, dated October 17, 1990 is reported at 748 F. Supp. 227 (S.D.N.Y. 1990). A copy is reprinted in the Appendix at page 10. The opinion of the United States District Court for the Southern District of New York, dated May 9, 1990 is reprinted in the Appendix at page 27.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered May 24, 1991. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). This petition has been filed within the time allowed by law,

pursuant to Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

AMENDMENT IV - SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

NEW YORK PENAL LAW

§35.15(2)(a)(ii)

§35.15 Justification; use of physical force in defense of a person

* * *

> 2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:
>
> > (a) He reasonably believes that such other person is using or about to use deadly physical force. Even in such

case, however, the actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating; except that he is under no duty to retreat if he is:

* * *

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; . . .

§35.30(1)(c)

§35.30 Justification; use of physical force in making an arrest or in preventing an escape

1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person form what he reasonably believes to be the use of imminent force of physical

force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

* * *

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

STATEMENT OF THE CASE

On March 12, 1982, respondent Carlos Soba, along with other felons, robbed at gunpoint more than 30 patrons of Emmi's Bar in Brooklyn, New York (113-14, 151, 209, 629).[1] During the armed robbery, a silent alarm was triggered, summoning various police officers, including petitioners Detective McComiskey and Police Officer O'Brien, who with defendant Sgt. McGoey fired a total of 14 shots and apprehended Soba as he was fleeing the scene of the crime and approaching the police head-on wielding a loaded, operative, sawed-off shotgun over one foot in length (211). Soba was tried and convicted along with his co-felon, Edwin Valles, while a third felon

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[1] Numbers in parentheses refer to pages in the Joint Appendix filed by petitioners in the United States Court of Appeals for the Second Circuit.

who accompanied Soba and Valles escaped (112, 267, 275-76). On July 25, 1988, the New York Supreme Court, Appellate Division, Second Department affirmed Soba's criminal conviction of robbery in the first degree (12 counts) and robbery in the second degree, concurring with Soba's counsel that no meritorious issues could be raised on appeal. 142 A.D.2d 744 (2d Dep't 1988). At the time Soba robbed Emmi's Tavern, he was on parole for burglary, another felony (208, 216).

Soba filed a pro se civil rights complaint in the United States District Court for the Southern District of New York, on or about October 11, 1983, seeking damages in the sum of $3,000,000 for "unreasonable and unjustified harm" (15-17). Soba's appointed pro bono counsel filed an amended complaint on or about November 27, 1984, alleging that

Soba "was without just cause, shot five times by the Police Defendants" (25-26).

Defendants moved for summary judgment on or about April 27, 1989, alleging, inter alia, that Soba's excessive force claim must fail as a matter of law, and the police officers were entitled to qualified immunity (40). By order entered May 9, 1990, the District Court granted the summary judgment motion on consent as to defendants Blackwell, Langan, the Police Department and the City of New York, and denied the motion as to the remaining three police officer defendants (McGoey, McComiskey and O'Brien), on the grounds that "issues of fact remain to be decided by a jury with respect to the reasonable use of force under the circumstances claimed by plaintiff," and that Soba's "credibility must be ascertained

by a jury and not by the Court" (A27).[2] On June 8, 1990, defendants McGoey, McComiskey and O'Brien filed a notice of appeal from the May 9, 1990 order denying summary judgment and qualified immunity, which interlocutory appeal was withdrawn by stipulation of the parties and so ordered by the Court of Appeals following the conclusion of the trial.[3] The trial was held on three days, August 1, 2 and 3, 1990, in the United States District Court for the Southern District of New York, before Judge Patterson and a jury.

---

[2] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix to this petition.

[3] Defendants' motions to stay the trial pending appeal from the denial of summary judgment on qualified immunity grounds were denied by the District Court on June 18, 1990, and by the Court of Appeals on July 17, 1990.

a. Why the police officers used deadly force to apprehend Carlos Soba.

On the evening of March 12, 1982, CARLOS SOBA robbed Emmi's Tavern in Brooklyn, New York, along with Edwin Valles and some of his friends (113-14). At the scene of the robbery, Soba was given a loaded shotgun about 12-14 inches in length (114, 141, 190-91, 211). When he was inside the bar with his co-felons, he displayed the shotgun inside his jacket, and removed money from the cash register and put it in his pocket, while the people inside the bar were lying lay on the floor (115-16, 141, 142, 146, 209-10). After he took the money, he noticed his friends had apparently departed, and he went outside the bar, where he took the shotgun out of his pants and planned to throw the shotgun away and "surrender" if he encountered police (116, 141, 147, 148, 150, 154, 158, 210, 212). He walked down the street toward the car

parked on 40th Street, holding the shotgun in a 45-degree angle from the lower chest area on the right side to the shoulder area on the left side, with the barrel of the gun about 2-3 inches above his left shoulder, the handle of the gun on his right side, and the muzzle up (117-18, 149-51, 154, 210-11). The top of the shotgun was above 3-4 inches from his left shoulder (211).

Soba stopped walking down Second Avenue, from 39th Street to 40th Street, when he saw the sergeant in uniform on the corner, in a crouched position facing away from Soba and pointing a revolver toward 40th Street (118-20, 159-60, 179, 180). Soba froze and watched the sergeant for about five seconds, until the policemen who were behind him shouted to the sergeant that Soba was behind him (120, 159, 160, 163, 180, 181). The sergeant then turned toward Soba and shot him in the stomach

(130, 177, 180, 214). After Soba felt the bullet, he said "Que pasa? I surrender" (A120, A177, A178, A212-13). Soba felt another shot in his hand, and then the officers in back started shooting (120, 214). Soba apparently turned in a counterclockwise position after a bullet hit him in the shoulder (214-15), and continued to hold his gun against his chest in the same position (121, 179, A214), without throwing the shotgun down or placing it on the ground because it could have exploded or "gone off," causing injury to the policemen or himself (160-62, 163, 182), and because if he had moved, the police "officers might have imagined that [he] was going to use the shotgun against them . . ." (182-83). After he was wounded, Soba fell to the ground, still holding the gun with his right hand (122). The sergeant then kicked the shotgun with his foot, placed it on the

ground next to Soba, and handcuffed Soba's hands behind his back, after which he was taken by ambulance to the hospital for treatment of his bullet wounds (122-24).

DR. WILLIAM STAHL reviewed Soba's medical records, which described six gunshot wounds to the right leg, superficial abdomen, left shoulder and left forearm, and medical treatment for the injuries (239-43, 427, 432). Dr. Stahl explained that a shotgun load (ranging from nine pellets to one hundred pellets) sticks together for about 8-10 feet, and then spreads out into a big pattern by 20 or 30 feet (245). At close range, if the load hits as one batch of shell, there can be tearing of tissue and tremendous life damage (245). On a sawed-off shotgun, the sawing off of the barrel allows the load to spread faster, depending upon the distance from the muzzle (245-46). A distance of 10 feet from a

sawed-off shotgun is relatively close to the muzzle, which can cause serious tissue damage, serious injury to a lung or other organs, or death (246-47).

POLICE OFFICER MARVIN BLACKWELL, assigned with Sgt. McGoey to the 4:00 p.m. to 12 midnight tour of duty, responded as a backup unit on March 12, 1982 to a police radio report of a robbery in progress (249-50). After stopping and exiting the marked radio patrol car, Blackwell saw a male run out of the bar with a shotgun in his hand (251-52). When the male stopped and pointed the shotgun at Blackwell, Blackwell fired two bullets at him, after which the man dropped the shotgun and ran away toward 40th Street (252-53).

Blackwell then saw two other males come out of the bar, one of whom was Soba with a shotgun in his hand, who began running down Second Avenue after seeing Blackwell

(253-54). Sgt. McGoey was one block away on the corner of 40th Street, about 500-600 feet away (261), and Blackwell yelled down the block to him that there were two more coming behind him and that one had a shotgun (253, 254, 263). Blackwell took cover behind a parked car, and a few seconds later he heard gunshots (253).

As SERGEANT ANDREW McGOEY walked with Officer Blackwell toward the bar, he saw an individual come out of the bar and turn and point a shotgun at Officer Blackwell (266-67). Blackwell fired two shots at him, and the individual turned and ran while McGoey pursued him on foot, stopping at the corner of 40th Street and Second Avenue to use the building line as cover (267).

McGoey heard someone yelling behind him, and turned to see two individuals come up behind him, one of whom was Soba

holding a shotgun in his hand and running toward McGoey (267, 281, 282). Soba was approximately 10 feet away, and was holding the shotgun about waist level as he ran, with his right hand in the trigger area and left hand on the barrel at waist level, and the gun pointing off to his left side about 45 degrees from the hip (267-69, 273). As McGoey turned to face Soba, who was then approximately 8 feet away, Soba brought his gun up to about chest level at a 90-degree angle, and pointed it at McGoey (267-69, 274, 275). McGoey yelled for Soba to "drop it," and fired six rounds from his revolver (267, 269). Soba then twisted to his right in the direction of 40th Street and Second Avenue (269-70). As McGoey was firing, he noticed simultaneous flashes out of the corner of his eyes, and realized the anti-crime unit, with McComiskey, O'Brien and Langan, had pulled up to the scene and

were also firing (270). Soba fell backwards into a sitting position with the shotgun laying in his lap (270). McGoey ran over, disarmed Soba by kicking the gun out of his hand, and secured the shotgun (270, 277). Soba's unarmed cofelon was later arrested up the block by other police officers (275-76). McGoey estimated that the entire incident, from the time he first saw Soba until he disarmed him, lasted a matter of seconds (278). McGoey was not wearing a bullet-proof vest at the time (274-75).

DETECTIVE THOMAS McCOMISKEY, assigned to an anti-crime unmarked car on March 12, 1982, and responding to two radio reports of a holdup in progress and "assist police officers, shots fired," observed a police officer chasing an unknown male, and then Soba coming up behind McGoey, with a sawed-off shotgun extended out in front of him in a firing position (301-03).

McComiskey heard McGoey scream "Drop it," and saw the flashes as McGoey fired his gun (303). McComiskey exited the vehicle with his gun in his hand (302-03). Soba, who was about 8 feet away from McComiskey, "did a complete 90-degree turn and faced" McComiskey, who then fired all six shots in his revolver (303-05, 308). McComiskey fired the six shots in under two seconds, and the entire incident during which shots were fired lasted no more than four seconds (309). Soba never indicated, either by words or by gestures, that he was surrendering (305). Detective McComiskey described a sawed-off shotgun as a deadly, illegally defaced weapon, commonly used for violent street crimes, and usually illegally possessed, which can have a deadly effect when used on an individual (304).

POLICE OFFICER THOMAS O'BRIEN was in the unmarked car with Police Officer

Langan and Detective McComiskey, when they received the radio calls of a robbery in progress, and then a "1013," which means "assist police officer" and "shots fired" (340-42). O'Brien observed McGoey and Soba facing and pointing guns at each other, about 8-10 feet apart, on the sidewalk of 40th Street and Second Avenue (342). Soba was holding a sawed-off shotgun about chest level, with the barrel of the gun facing toward McGoey (342). As O'Brien exited the car, McGoey fired his weapon at Soba, and Soba then turned toward O'Brien, who yelled for Soba to drop the gun (342-43). O'Brien discharged two shots at Soba, who fell after the second shot (343, 344, 354). O'Brien did not hear Soba say anything (343), and discharged his weapon almost simultaneously as he exited the vehicle (343).

A second individual ran off toward Third Avenue, and O'Brien chased him after

Soba fell, apprehending him about three-quarters up the block (343-44). O'Brien had three bullets remaining in his gun, but did not discharge his gun at the second perpetrator because he did not see a weapon or perceive any threat from him (345).

b. The Jury Verdict.

The jury rendered a verdict in favor of McGoey and against McComiskey and O'Brien, and awarded Soba $60,000 in compensatory damages. The jury responded to special interrogatories (411-14):

> 1. A. Did plaintiff prove by preponderance of the evidence that Andrew McGoey used excessive force in effecting the plaintiff's arrest?
>
> Answer: No.
>
> B. Did plaintiff prove by preponderance of the evidence that Thomas O'Brien used excessive force in effecting the plaintiff's arrest?
>
> Answer: Yes.

C. Did plaintiff prove by preponderance of the evidence that Thomas McComiskey used excessive force in effecting the plaintiff's arrest?

Answer: Yes.

2. What amount of money would reasonably compensate plaintiff for his past pain and suffering?

Answer: $30,000.

3. What amount of money would reasonably compensate plaintiff for his future pain and suffering?

Answer: $30,000.

4. Do you find that any of the defendants, with regard to whom you answered YES in Question 1, acted maliciously or wantonly?

Answer: Yes.

5. What amount of money, if any, do you award the plaintiff in terms of punitive damages?

Answer: $0.

c. The District Court's Opinion

In denying McComiskey's and O'Brien's motion for a directed verdict, for judgment notwithstanding the verdict, or alternatively

for a new trial, the District Court concluded that there was sufficient evidence to support the jury's verdict (A10-26). After reviewing the evidence adduced at trial, the District Court found that the testimony conflicted as to the direction Soba turned when the shot hit him in the shoulder, in that Soba claimed he turned counterclockwise and thus away from McComiskey and O'Brien, whereas the police officers all testified that he turned clockwise towards McComiskey and O'Brien (A21-22). Although Dr. Stahl never testified as to the sequence of the shots, the effect of the force of the bullets on Soba's body, how his body turned after he was shot, or the direction from which the bullets supposedly entered Soba's body, the District Court nevertheless concluded that Dr. Stahl's testimony corroborated Soba's testimony as to how his body turned, since the Court concluded that four of the five

bullets of a nonsuperficial nature hit Soba in the left side (A22-23). The Court then concluded that in light of this evidence, the jury accepted McGoey's testimony that he fired in self-defense, but rejected the testimony of McComiskey and O'Brien that they fired in self-defense. Since McComiskey and O'Brien did not testify that they were firing to protect McGoey, but rather, testified that Soba was threatening them and was no longer facing McGoey, the Court found no need to address that issue in its opinion (A23). The Court then found:

> Having concluded that there was sufficient evidence for the jury to reject McComiskey and O'Brien's testimony that they fired in self-defense with Soba's sawed-off shotgun pointed at them, it was permissible for the jury to infer that their testimony was developed to cover a failure on their part to act properly (A23).

The Court concluded that the jury, with its ample opportunity to assess Soba's

credibility, could permissibly deduce that excessive force had been used,

> particularly if it concluded that Soba's back was to McComiskey and O'Brien, that he had been wounded at least three times by McGoey, and he had turned counterclockwise from McGoey and was no longer a threat to him (A24).

The Court further denied qualified immunity, holding:

> In view of the jury's disbelief in the defendants' testimony and other evidence, the jury could have reasonably inferred that McComiskey and O'Brien acted maliciously or wantonly, with the result that defendants are not entitled to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 816-817 (1982) (A24-25).

The District Court accordingly denied McComiskey's and O'Brien's motion (A25), and entered judgment on February 4, 1991 in favor of Soba and against McComiskey and O'Brien (A6-9).

d. The Court of Appeals' Decision.

In a summary order dated May 24, 1991, the United States Court of Appeals for the Second Circuit affirmed the District Court judgment (A1-5). The Court noted that to establish an excessive force claim, a plaintiff must demonstrate that the police officer used "objectively unreasonable" force under the circumstances with which he was confronted, and that disregarding McComiskey's and O'Brien's underlying intent and motivation, the jury could have permissibly rejected their claims that they fired in self-defense (A3). The Court also concluded that the facts further supported the jury's different conclusions with respect to the objective reasonableness of the force used by Sergeant McGoey, and that used by Detective McComiskey and Officer O'Brien (A3-4).

The Court further held, without analysis, reasoning or explanation, that McComiskey and O'Brien were not entitled to qualified immunity, in that the Court believed that the record supported such a conclusion (A4). The Court of Appeals accordingly affirmed the District Court judgment in its entirety (A5).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' ruling that McComiskey and O'Brien were not entitled to qualified immunity as a matter of law with respect to Soba's excessive force claim conflicts with the decisions of this Court and other Circuits.

The Court of Appeals' holding in this case imposes an impossible standard upon police officers who must face and apprehend armed and dangerous fleeing felons: either they must be shot at first before being permitted to fire their weapons; or they must risk serious physical injury or death because they must perceive in a matter of seconds that a felon fleeing the scene of a violent crime, who makes no attempt to surrender before he is first shot and faces police with a loaded sawed-off shotgun which he does not drop even after he is shot, is somehow no longer a threat to them; or they must risk civil liability for firing their weapons to defend themselves or others

against the threat of imminent deadly force. Soba has failed to demonstrate that these police officers' use of force in this case was "objectively unreasonable," or that any lesser degree of force than that utilized here would have been objectively reasonable under these circumstances. Soba presented absolutely no evidence as to what the appropriate response or use of force should have been in this case, or what lesser protective measures than those undertaken by these officers would have been sufficient to defend against the threat of an armed fleeing suspected robber.

The District Court's and Court of Appeals' rulings in this case improperly second-guessed, with the luxury of hindsight in the relative peace of a courtroom and judges' chambers, the actions of these police officers, who by all accounts faced a sawed-off shotgun in the hands of a

fleeing felon, and were forced to respond to the dangerous, life-threatening situation in the blink of an eye, with only a split-second to make the crucial decision. In any other similar scenario, underestimating the danger and amount of force necessary to prevent it, as the Court of Appeals and District Court required, could mean the difference between the police officers' life and death, a rather significant hazard from which the judges and jury were spared when making their decision in this case.

(1)

This Court has not yet addressed or determined the extent of the availability or the applicability of qualified immunity to claims alleging use of excessive force or deadly excessive force. In Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865, 1873 n.12 (1989), case involving an excessive force claim where the issue of qualified

immunity was not raised, this Court reserved judgment on the issue, noting that "the officer's objective 'good faith' -- that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment -- may be relevant to the availability of the qualified immunity defense to monetary liability under §1983" (emphasis in original); see also Slattery v. Rizzo, __ F.2d __, n.4 (4th Cir. July 25, 1991) (Powell, J., United States Supreme Court Associate Justice (Retired), sitting by designation). Most Circuit Courts have applied qualified immunity to excessive force claims, or have ruled on such claims in the context of assertions of qualified immunity. See, e.g., Finnegan v. Fountain, 915 F.2d 817, 822-23 (2d Cir. 1990); Rodriguez v. City of Passaic, 914 F.2d 244 (3d Cir.), aff'g 730 F. Supp. 1314, 1327 (D.N.J. 1990); Slattery v. Rizzo, supra, (4th Cir.

July 25, 1991); Mouille v. City of Live Oak, 918 F.2d 548, 551 (5th Cir. 1990); Jackson v. Hoylman, 933 F.2d 401 (6th Cir. 1991); Fitzgerald v. Patrick, 927 F.2d 1037, 1038 (8th Cir. 1991); Thorsted v. Kelly, 858 F.2d 571 (9th Cir. 1988); Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990); Clarke v. Evans, 840 F.2d 876, 881-82 (11th Cir. 1988).

(2)

The Court of Appeals, in affirming the District Court's conclusion that McComiskey and O'Brien were not entitled to qualified immunity, based upon the jury's reasonable inference that they acted maliciously or wantonly, misapplied the doctrine of qualified immunity as set forth by this Court in Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982), which reformulated the standard for qualified immunity to eliminate its subjective components, and to focus "primarily on

objective factors" and the "objective legal reasonableness" of the official action. The jury's inference as to malice, whether reasonable or not, or the officers' subjective beliefs, should not have been dispositive of their entitlement to qualified immunity, which generally turns on the "objective legal reasonableness" of the action. See Anderson v. Creighton, 483 U.S. 635, 639, 641 (1987) (in qualified immunity analysis, Harlow sought to minimize inquiry into official's subjective intent; law enforcement officer's subjective beliefs about lawfulness of warrantless search are irrelevant); see also Whitmore v. Arkansas, __ US __, 110 S. Ct. 1717, 1735 (1990) (Harlow abandoned subjective element of qualified immunity defense, to replace the inquiry into subjective malice with an objective inquiry into the legal reasonableness of the official action); Davis v. Scherer, 468 US 183, 191

(1984) (Harlow rejected the inquiry into state of mind in favor of a wholly objective standard; qualified immunity depends upon the objective reasonableness of an official's conduct, and no other "circumstances" are relevant to the issue of qualified immunity). Thus, in determining qualified immunity, the relevant inquiry in this case should have been not whether McComiskey and O'Brien acted maliciously in shooting at Soba, but rather, whether they could have objectively and reasonably believed that the force used was necessary under the circumstances and did not violate Soba's Fourth Amendment rights.

Moreover, although the District Court found the jury's determination to be relevant to the issue of qualified immunity, there is a conflict among the Circuits as to whether qualified immunity is ultimately a legal determination for the Court, or an issue to

be submitted to and resolved by the jury. Compare, e.g., Slattery v. Rizzo, supra ("the purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury"); Finnegan v. Fountain, supra, 915 F.2d at 821 ("Once disputed factual issues are resolved, the application of qualified immunity is, however, ultimately a question of law for the Court to decide"), and Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir.), cert. denied, 111 S. Ct. 431 (1990) ("The ultimate legal determination whether, on the facts found, a reasonable police officer should have known he acted unlawfully is a question of law better left for the court to decide"), with Thorsted v. Kelly, supra, 858 F.2d at 576 (9th Cir. 1988) (district court did not err by submitting qualified immunity

instruction to the jury), and Street v. Parham, 929 F.2d 537, 540 (10th Cir. 1991) (once the jury concluded that excessive force had been used, the inquiry as to objective reasonableness was over; the qualified immunity question was answered as part of the jury's consideration of the excessive force claim).

(3)

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of legal rules that were "clearly established" at the time the action was taken. Anderson v. Creighton, supra, 483 U.S. at 639, citing Harlow, supra, 457 U.S. at 818-19. The relevant inquiry is whether it was objectively reasonable for the police officers to believe that their use of force

under the circumstances was reasonable and lawful, and did not violate plaintiff's rights, in light of clearly established law and the information available to the officers at that time. Anderson v. Creighton, supra, 483 U.S. at 641. A police officer should prevail on qualified immunity grounds if a reasonable officer possessing the same information could have believed that his conduct was lawful. Id. Thus, if a reasonable officer could have found probable cause to believe that Soba presented a serious threat of personal harm to the officers at the time McComiskey and O'Brien pulled the trigger, then these officers should be entitled to qualified immunity as a matter of law. See Slattery v. Rizzo, supra. Where there is a legitimate question as to whether the police officer's conduct would objectively violate the plaintiff's right, qualified immunity affords police officers the necessary latitude to

pursue their duties without having to anticipate, on the pain of civil monetary liability, future refinements or clarifications of constitutional law. Id. Qualified immunity protects all such officials unless the law clearly prohibited the action. Id., citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

A defendant's conduct may in fact violate a plaintiff's civil rights under §1983, but the defendant may be qualifiedly immune from individual liability if the defendant's conduct was objectively reasonable in light of clearly established law at the time of the conduct. See, e.g., Mouille v. City of Live Oak, supra, 918 F.2d at 551. Thus, even if an officer used force that was objectively unreasonable under Graham, he or she may be protected by qualified immunity if he or she reasonably believed, based upon the facts and circumstances, that the force used

was lawful. Merzon v. County of Suffolk, ___F. Supp. ___ (E.D.N.Y. June 17, 1991). "In sum, although an officer's conduct may be 'objectively unreasonable' under the Fourth Amendment analysis of Graham, he or she may nonetheless be entitled to a cloak of qualified immunity against personal liability under the Harlow standard." Id. Inevitably, in some cases, police officers will be mistaken about the necessary use of force, but where they have acted in a manner which they reasonably believe to be lawful, they should not be held personally liable.[4] See Anderson v. Creighton, 483 U.S. at 641.

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[4] But see Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991) ("in excessive force claims asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry. This is because, in the excessive force context, the Fourth Amendment inquiry

(Footnote Continued)

To determine whether the law McComiskey and O'Brien allegedly violated was clearly established, or whether it was objectively reasonable for them to mistake the need for the force used at that time, the relevant focus is the law as it existed in 1982, the time of these officers' actions. The existence of state statutes in effect in 1982 is relevant to the officers' entitlement to qualified immunity.[5] See Davis v. Little,

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(Footnote Continued)
asks directly whether the police officer reasonably could have believed that the force was necessary under the circumstances").

[5] Inasmuch as the Second Circuit had determined that qualified immunity is an issue of law to be decided by the Court, see Finnegan v. Fountain, supra, 915 F.2d at 821, petitioners' legal argument with respect to New York Penal Law §§35.15(2)(a)(ii) and 35.30(i)(c) was not presented as evidence to the jury, since these statutory provisions in effect at the time of the incident relate to the legal determination of the officers' entitlement to qualified immunity, rather than to any factual determination by the jury of excessive force. These statutes were
(Footnote Continued)

851 F.2d 605, 610 (2d Cir. 1988); see also Estate of Jackson v. City of Rochester, 705 F. Supp. 779, 783-84 (W.D.N.Y. 1989).

Not only were Soba's rights as to the degree of force to be used not clearly established in 1982, as Soba was concededly an armed felon fleeing the scene of a robbery and facing police officers wielding a loaded, operable sawed-off shotgun, but it was also certainly objectively reasonable for these officers to believe that their actions, in shooting to protect themselves and others, did not violate whatever "clearly established" rights Soba had. New York law in effect at the time of this incident provided justification for the use of deadly force where, as here, a police officer had

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(Footnote Continued)
properly raised in support of the officers' qualified immunity argument in their motion for a directed verdict or judgment notwithstanding the verdict (653-54, 698-99).

reasonable cause to believe that a suspect posed a threat of serious physical harm to himself or others. New York Penal Law §35.15(2)(a)(ii), amended in 1980 to expressly include police officers, provides that a police officer may use deadly force upon another person if he "reasonably believes that such other person is using or about to use deadly physical force." Similarly, New York Penal Law §35.30(1)(c) provides that in the course of effecting or attempting to effect an arrest, a police officer may use deadly force if he "reasonably believes that ... the use of deadly physical force is necessary to defend the police officer . . . or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force." Soba has not demonstrated that these Penal Law provisions are unconstitutional either on their face or as

applied to the circumstances at bar, where these officers had objective reasonable cause to fear serious physical harm from an armed felon fleeing the scene of an armed robbery, and were confronted with a life-threatening situation on a darkened street at night, at a time when shots had already been fired.

Soba's own version of the events demonstrates that he and others robbed a bar in Brooklyn on the evening of March 12, 1982; he held the 12-14 inch sawed-off shotgun in his hands when he exited the bar after taking money from the cash register, and planned to throw the shotgun away if he encountered police officers; he proceeded down Second Avenue holding the shotgun in his hands, and observed McGoey in uniform on the corner of Second Avenue and 40th Street, facing and pointing a revolver toward 40th Street; McGoey did not see Soba from that position; Soba froze and watched

McGoey for about five seconds, until he heard the police behind him yell to the sergeant that Soba was behind him; Soba did not say anything, or attempt to surrender, before McGoey turned and shot him in the stomach; Soba said, "Que pasa? I surrender," because he had been shot in the stomach, and did not say anything until after he felt the bullet; when the first officer shot, the other officers behind Soba started to shoot; Soba continued to hold the gun against his chest in the same position, and did not throw the shotgun down, because it could have exploded or "gone off," causing injury to the policemen or himself, and the "officers might have imagined" that Soba was going to shoot at them; Soba never let go of the shotgun, even after he fell to the ground; and Soba was not shot at any time after he fell to the ground.

It is thus undisputed that as Soba was leaving the scene of an armed robbery in a crowded bar, carrying the loaded, sawed-off operative shotgun in plain view and in a position from which it could readily and quickly be lowered, aimed and fired, he came up behind McGoey, whose back was turned watching for another escaping previously armed felon, and who did not see Soba. Soba knew police officers were behind him, and heard them shout to McGoey that Soba was behind him. Soba, who faced officers from about 8 feet away with the sawed-off shotgun in his hands, ready to shoot, for at least five seconds, did not say anything, or indicate by words or actions that he was surrendering, before he was first shot, even though he testified that he would have thrown the shotgun away had he seen police officers outside the bar. Soba continued to hold the shotgun in the same

position even after he was shot and fell to the ground, and no shots were fired after Soba fell to the ground, still holding the sawed-off shotgun. In fact, O'Brien only fired at Soba twice, with three bullets left in his gun. Moreover, Soba's co-felon Valles, who was unarmed, was apprehended up the block without being shot, and the other armed co-felon escaped and was not shot at after he dropped the gun and fled.

The time sequence in which all the shots were fired was undisputably within 2-4 seconds, as Detective McComiskey testified, within "a few seconds," as Officer Blackwell observed, within "seconds," as Sergeant McGoey testified, and virtually "simultaneously," as both Sergeant McGoey and Officer O'Brien described. Also undisputed is that Soba never indicated by physical actions that he was surrendering; he never raised his arms above his head in a

gesture of surrender, or dropped his shotgun or threw it down when he encountered the police, which he testified he would have done had he wished to surrender. In fact, Soba stood with the 12-14 inch sawed-off shotgun in his hands for a full five seconds behind McGoey, without McGoey seeing him, and continued to hold the shotgun in the same position even after he was shot. Soba, by his own testimony, was about 8-10 feet away from these police officers, wielding a loaded, operative sawed-off shotgun, and it is now undisputed that it was at least objectively reasonable for McGoey, who shot at Soba only a split-second before McComiskey and O'Brien started shooting at Soba, to believe McGoey was in danger. Moreover, Soba never testified that he was shot in the back, nor did any medical evidence indicate or demonstrate that he was shot in the back or

that any of the bullets entered his body from the back. Finally, given the split-second nature of what transpired, it would have been impossible for McComiskey and O'Brien to ascertain, in virtually the blink of an eye, after shots had been fired, whether Soba or McGoey or one of the other officers had fired the initial gunshots, or whether Soba or the police had already been hit by gunfire, or whether Soba was in fact attempting to surrender, as he testified.

Soba made absolutely no attempt to articulate or demonstrate what lesser degree of force, or other lesser measures, could or should have been taken in this case, or what degree of force would have been objectively reasonable at that distance of 8-10 feet, in that time sequence of a matter of seconds, and against that illegally defaced weapon in the hands of a felon fleeing from the scene of an armed robbery to which these officers

had been summoned. Without demonstrating, through expert testimony or otherwise, that any other lesser or different action would have sufficed or have been "objectively reasonable" under the rapidly evolving circumstances which required these officers to make a spilt-second judgment, the jury had no basis upon which to conclude or infer that McComiskey and O'Brien used excessive force (by firing a total of 8 shots from their service revolvers virtually simultaneously or within a split-second after McGoey fired all 6 shots in his revolver), or that their use of force was objectively unreasonable.

In light of the undisputed evidence, and drawing all reasonable inferences from it in favor of Soba (including the District Court's inferences that Soba's back was to McComiskey and O'Brien, he had been wounded at least three times by McGoey, and he had turned counterclockwise from

McGoey), it was still objectively reasonable for McComiskey and O'Brien to believe that their use of deadly force within seconds of McGoey's six shots did not violate Soba's rights, just as McGoey was found justified in so believing, in that they all had probable cause to believe that Soba, who had not dropped the shotgun or physically indicated or gestured in any that way he had already been shot or was in the process of surrendering, posed a real or imminent threat of death or serious bodily injury to themselves or others. At the very least, officers of reasonable competence could certainly have disagreed as to whether such force was necessary, or whether some means less drastic than the use of a service revolver would or could have sufficed under these circumstances. Soba never cited any constitutional requirement that police officers faced with the imminent threat of deadly

force against them or others should not respond with deadly force, where objectively reasonable to do so. The Constitution does not require police officers to use a minimum of violence when attempting to stop a suspect from using deadly force against police officers or others, as such a requirement would expose police officers to unnecessary risks. Requiring police officers to take unnecessary risks in the performance of their duties is unreasonable. See Terry v. Ohio, 392 U.S. 1, 23-24 (1968).

Accordingly, the Courts below erred in failing to conclude that Detective McComiskey and Police Officer O'Brien not only acted objectively reasonably in view of the imminent potential threat to their lives and the lives of others around them, including that of McGoey, but also did not violate any clearly established federal law or Constitutional right of Soba. Facing the

deadly threat of a sawed-off shotgun about 8 feet away, from a suspected perpetrator of an armed robbery, where shots had already been fired and no surrender was ever evident, or even attempted before the first shot was fired, McComiskey and O'Brien acted in a split-second in a tense and rapidly evolving situation, without the luxury of knowing, as the Courts below somehow concluded based upon Soba's testimony eight years after the fact, that Soba, an unknown and possibly dangerous criminal, really intended to surrender and did not really intend to shoot these officers. An objectively reasonable amount of force was used under these circumstances, entitling McComiskey and O'Brien to qualified immunity as a matter of law, and dismissal of Soba's excessive force claim.

The Court of Appeals' decision in this case also conflicts with the decisions of other

Circuits which have invoked qualified immunity to dismiss, as a matter of law on motions for summary judgment, cases involving the use of deadly force. See, e.g., Slattery v. Rizzo, supra (4th Cir. July 25, 1991); Fitzgerald v. Patrick, 927 F.2d 1037 (8th Cir. 1991); Rodriguez v. City of Passaic, 914 F.2d 244 (3d Cir.), aff'g 730 F. Supp. 1314 (D.N.J. 1990); Henry v. Perry, 866 F.2d 657 (3d Cir. 1989).

Moreover, qualified immunity, which is immunity from suit rather than a mere defense to liability, and which is effectively lost where, as here, the case is erroneously permitted to proceed to trial, see Mitchell v. Forsyth, supra, 472 U.S. at 526-27, should be determined on the basis of the District Court record as it existed at the time of the police officers' motion for summary judgment, rather than on the basis of the trial record,

since qualified immunity was appropriate as a matter of law at that pre-trial stage, and should have been granted at that time, on the summary judgment record, prior to trial. Mitchell v. Forsyth, supra; Harlow v. Fitzgerald, supra, 457 U.S. at 817-18 (qualified immunity doctrine, relying on the objective reasonableness of official conduct, permits the resolution of many insubstantial claims on summary judgment, and avoids excessive disruption of government and subjecting officials to the burdens and costs of trial and broad-reaching discovery).

(4)

Finally, in addition to the erroneous ruling on qualified immunity, the Court of Appeals' ruling upholding the District Court's conclusion that McComiskey and O'Brien used excessive force under the circumstances also conflicts with the decisions of this Court and other Circuits.

The Court of Appeals held that Soba had established his excessive force claim, and had demonstrated that the force used was objectively unreasonable under the circumstances, in that disregarding McComiskey's and O'Brien's underlying intent and motivation, the jury could have rejected their claims that they fired in self-defense, and the facts supported the jury's different conclusions with respect to the force used by McGoey and that used by McComiskey and O'Brien. The Court of Appeals in effect affirmed the District Court's ruling that

there was sufficient evidence for the jury to reject McComiskey's and O'Brien's testimony that they fired in self-defense, and that it was permissible for the jury to infer that their testimony was developed to cover their failure to act properly.

These holdings, which require consideration of McComiskey's and O'Brien's stated reasons for firing at Soba, and the jury's rejection of those reasons and inference as to the officers' lack of good faith for purposes of determining excessive force, directly conflict with this Court's opinion in Graham v. Connor, supra, 109 S. Ct. at 1871, 1872, in which this Court held that excessive force claims, deadly or not, should be analyzed under the Fourth Amendment and an objective reasonableness standard in light of the facts and circumstances confronting the officers, without regard to their underlying intent or

motivation.[6] The Courts below improperly put in issue the subjective motivation of these individual officers, which has no bearing on whether the force used was objectively unreasonable under the Fourth Amendment. See id. at 1872. Even assuming the evidence was sufficient for the jury to reject McComiskey's and O'Brien's testimony that they fired in self-defense, as the Courts below concluded, consideration of whether the officers acted in "good faith" or with good intentions, as in self-defense (as

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[6] Although the events at issue herein occurred in 1982, the Second Circuit has ruled that the Fourth Amendment reasonableness standard articulated in Tennessee v. Garner, 471 U.S. 1 (1985), governing pre-arrest claims of excessive force, is to be applied retroactively. Davis v. Little, 851 F.2d 605, 610-11 (2d Cir. 1988); see also Dixon v. Richer, 922 F.2d 1456, 1461-62 (10th Cir. 1991) (applying Fourth Amendment "objective reasonableness" standard to officers' alleged conduct in incident which occurred prior to Graham).

the officers testified), or maliciously and wantonly, for the very purpose of causing harm (as the jury determined in Special Interrogatory No. 4 with respect to one or both of the officers), is simply incompatible with a proper Fourth Amendment analysis for excessive force claims. See Graham, supra, 109 S. Ct. at 1872. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor will an officer's good intentions make an objectively unreasonable use of force constitutional. Id. Rather, determining whether the force used was reasonable under the Fourth Amendment requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting

arrest or attempting to evade arrest by flight." Id. at 1871-72, citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985). Notably, the calculus of reasonableness must allow for the fact that police officers are often forced to make split-second judgments, in tense, uncertain and rapidly evolving circumstances, about the amount of force that is necessary in a particular situation. Graham, supra, 109 S. Ct. at 1872. Significantly, however, as in other Fourth Amendment contexts, the "reasonableness" inquiry in an excessive force case is an objective one, and concerns whether the officers' actions were "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Id.

Applying this standard to the force used in this case to apprehend Soba, without consideration of the police officers'

underlying intent or motivation (whether in fact prompted by good faith self-defense, as they testified, or by malice, as the jury found), it was certainly "objectively reasonable" under the Graham standard articulated by this Court for McComiskey and O'Brien to fire their revolvers at Soba, in order to stop and defend against an armed suspected felon fleeing with others, at least one of whom was also armed, from the scene of an armed robbery, surrounded by police officers about 8 feet away and wielding a loaded sawed-off shotgun. Armed robbery is certainly a severe crime, Soba certainly posed an immediate threat to the safety of the officers or others, and by his own admission, he was heading toward the getaway car and was actively fleeing the scene of the crime.

This case also presents a conflict between the Second Circuit and other Circuit

Courts that have ruled as a matter of law on the objective reasonableness of the use of deadly force. See e.g., Reese v. Anderson, 926 F.2d 494, 501 (5th Cir. 1991) (summary judgment granted for police officer's use of deadly force that killed an unarmed robbery suspect, since officer could have reasonably believed that decedent had retrieved a gun and was about to shoot); Ford v. Childers, 855 F.2d 1271, 1275 (7th Cir. 1988) (upholding directed verdict for use of deadly force against fleeing bank robber who might have been holding a gun at time he was shot, and whom police officer reasonably concluded was armed and dangerous); O'Neal v. DeKalb County, Ga., 850 F.2d 653 (11th Cir. 1988) (upholding use of deadly force against decedent who rushed at officers with a raised knife). Soba's actions in this case, which included facing police officers holding a loaded, operative sawed-off shotgun from

about 8 feet away, in the course of fleeing with other felons from an armed robbery to which these officers had been summoned, could certainly and reasonably have caused McComiskey and O'Brien to fear imminent and serious physical harm (just as McGoey was found justified in so fearing), and to use the objectively reasonable amount of force necessary to protect themselves and others from such a deadly threat.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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